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October 6, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Petition for Special Redress

Name of Case: Beryllium Petition

Date of Filing: January 7, 2005

Case Number: TEG-0001

XXXXXXXXXX (the Petitioner), an employee of BWXT Y-12, L.L.C. (the Contractor), filed a Petition for Special Redress (the Petition) with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). The Petitioner contends that the Contractor has refused to provide benefits to which he is entitled under the DOE's Chronic Beryllium Disease Prevention Program (hereinafter "the CBD Prevention Program," "the Program," or "the Rule"), 10 C.F.R. Part 850. Specifically, the Petitioner argues that (1) because there is detectable beryllium in his workplace, he is entitled to "permanent medical removal protection benefits" which would allow him to stop working for two years while maintaining his salary, seniority and other benefits and (2) the Contractor wrongfully failed to compensate him for wages lost in connection with various medical absences.

As explained in greater detail below, we have determined that the Program does not provide for the claimed relief. First, the Rule does not require contractors to provide a beryllium-free environment. Rather, it provides for permanent medical removal protection benefits when a "beryllium-associated worker" cannot be transferred to a comparable position where beryllium exposures are "below the action level." 10 C.F.R. § 850.35(b)(ii); see also 10 C.F.R. § 850.3 (definition of "beryllium-associated worker"), 10 C.F.R. § 850.23(a) (definition of "action level"). Permanent medical removal protection benefits include maintaining the worker's earnings, seniority, and other worker rights and benefits. *Id.* § 850.35(b)(ii). In this case, the Petitioner was removed to a position that satisfies the requirements of the Rule and, therefore, he is not entitled to permanent medical removal protection benefits. Second, the Rule contains no provision for compensation for absences related to CBD symptoms or treatment. Accordingly, we have determined that the Petition should be denied.

## I. Background

One of the purposes of the CBD Prevention Program is to identify chronic beryllium disease (CBD) in the worker population through medical surveillance and, when necessary, to provide for medical removal of beryllium-associated workers. 64 Fed. Reg. 68854. If a DOE worker believes that a DOE contractor is not complying with the Rule, the worker can petition to OHA to resolve the dispute. See 10 C.F.R. § 850.5. The Petition was filed pursuant to that provision.

Most of the facts in this case appear undisputed. The Petitioner is a machinist who has worked for the Contractor since 1968 and was diagnosed with CBD in 1993. In 1994 or 1995, the Contractor transferred the Petitioner to his current job location in order to minimize his exposure to beryllium. The Petitioner states that "[t]he transfer was made following incidents in [his] former work area where beryllium parts were routinely brought into the area, and there was concern that [he] could not be protected." Petitioner's Letter, April 15, 2005.

The Petitioner contends that the Contractor wrongfully denied his request for "permanent medical removal protection benefits." 10 C.F.R. § 850.35(b). The Petitioner states that there have been several incidents where detectable amounts of beryllium were found in his workspace. Petitioner's Letter, April 15, 2005. Therefore, the Petitioner maintains, he is entitled to stop working and receive two years' worth of salary and benefits.

The Petitioner also contends that the Contractor has wrongfully failed to compensate him for lost wages attributable to various medical absences. According to the Petitioner, the absences were beryllium-related and, therefore, he should have been compensated for them. Petitioner's Letter, January 4, 2005; Petitioner's Letter, April 15, 2005.

In response to the Petition, the Contractor contends, *inter alia*, that the CBD Prevention Program does not provide for the claimed benefits. The Contractor also states that the Petitioner settled a state workers' compensation claim, pursuant to which the Petitioner received "a monetary award for permanent partial disability, which was intended to compensate him for future wage loss." Contractor's Letter, January 28, 2005.<sup>1</sup>

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<sup>1</sup> The Contractor stated that the settlement also provided for the payment of future CBD-related medical expenses for life.

## II. Analysis

### A. Permanent Medical Removal Protection Benefits

The Petitioner contends that the Contractor has denied him "permanent removal protection benefits" i.e., the right to stay home and collect two years' worth of salary and benefits. In support of his contention, the Petitioner argues that there are detectable amounts of beryllium in his current work environment. In essence, the Petitioner argues that he is entitled to a beryllium-free environment. As explained below, the Rule does not create such a right.

Section 850.35 of the Rule governs medical removal. The Rule provides for permanent medical removal of a "beryllium-associated worker" from a job involving exposure to beryllium if the site occupational medical director (SOMD) determines that it is "medically appropriate" to do so. 10 C.F.R. § 850.35. The Rule requires that a contractor provide the beryllium-associated worker the opportunity to "transfer to another position which is available, or later becomes available, for which the beryllium-associated worker is qualified (or for which the worker can be trained in a short period) and where beryllium exposures are as low as possible, but in no event at or above the action level." *Id.* § 850.35(b)(i). The Rule also provides that "*if the beryllium-associated worker cannot be transferred to a comparable job where beryllium exposures are below the action level*" the contractor must provide a maximum of two years of permanent medical removal protection benefits. *Id.* § 850.35(b)(ii) (emphasis added). Permanent medical removal protection benefits include maintaining the removed worker's total normal earnings, seniority and other worker rights and benefits, as though the worker had not been removed. *Id.* § 850.35(b)(3).

It is undisputed that the Contractor has afforded the Petitioner medical removal to a comparable job. According to the Petitioner, he was moved to his current position in 1994 or 1995, several years before the enactment of the Rule, to protect him from exposure to beryllium. He further states that he "remain[s] in the same job classification category. While the location changed, the job did not, [he is] still an hourly machinist." Petitioner's Letter, April 15, 2005.

The Petitioner's contention that he is entitled to a beryllium-free environment is inconsistent with the express terms of the Rule. Under the Rule, a worker is entitled to permanent removal protection benefits if the contractor cannot provide a comparable job "where beryllium exposures are below the action level." 10 C.F.R. § 850.35(b)(ii); see also, 10 C.F.R. § 850.23(a) (definition of "action level"). The Petitioner concedes that beryllium exposures at his current job are below the action level. See Electronic Mail Message from Petitioner to Janet Freimuth, OHA, March 30, 2005. Accordingly, there is no basis for finding that the Petitioner is entitled to permanent removal protection benefits under the Rule.

## B. Wage Loss Complaints

The Petitioner also contends that he is entitled to lost wages for absences attributable to CBD symptoms or treatment. The Petitioner argues that the CBD Prevention Program provides for compensation for these types of wage loss and is in addition to that available through workers' compensation programs. As explained below, the Rule does not provide for the claimed compensation.<sup>2</sup>

The Rule contains no provision providing for compensation for lost wages for absences associated with CBD symptoms or treatment. Instead, the Rule provides for medical surveillance or monitoring. The Rule requires that a contractor "establish and implement a medical surveillance program for beryllium-associated workers who voluntarily participate in the program." 10 C.F.R. § 850.34(a). The medical surveillance program "is aimed at (1) identifying workers at higher risk of adverse health effects from exposure to beryllium; (2) preventing beryllium-induced disease by linking health outcomes to beryllium tasks; and (3) making possible the early treatment of beryllium-induced disease." 64 Fed. Reg. 68889. Thus, the program is designed to ensure the prompt identification of workers who have become sensitized to beryllium or who have developed CBD; it is not designed to provide compensation for wage loss attributable to CBD symptoms or treatment and, therefore, does not provide for the type of relief the Petitioner seeks.<sup>3</sup>

## III. Conclusion

The Petitioner is not entitled to be "sent home" with full wages, seniority, and benefits for two-years. Instead, the Petitioner has been granted medical removal to a comparable job where beryllium exposures are below the action level. Similarly, the Petitioner is not entitled to lost wages from absences related to CBD symptoms and treatment. While participation in the contractor's medical

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<sup>2</sup> We note that it is not clear whether the Petitioner has satisfied the requirement that he exhaust applicable grievance-arbitration procedures with respect to his claims for lost wages. We do not, however, believe that we need to further examine that issue here, since the Rule does not provide for the type of relief requested.

<sup>3</sup> Although the CBD Prevention Program is not a workers' compensation program, there are compensation programs for workers, such as the Petitioner, who develop CBD in the course of their employment with DOE. In addition to state workers' compensation programs, the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act), as amended, see 42 U.S.C. §§ 7384 et seq., provides for two separate compensation programs, both of which would be available to a DOE contractor employee with CBD. Subpart B of the Act provides uniform lump-sum payments and medical benefits to DOE contractor employees with CBD. 42 U.S.C. § 7384l; 20 C.F.R. Parts 1 and 30. Subpart E - a federal workers' compensation program for DOE contractor employees - provides variable lump-sum payments (based on a worker's permanent impairment and/or years of established wage-loss) and medical benefits. See 42 U.S.C. § 7385s; 20 C.F.R. Parts 1 and 30.

surveillance program should not result in lost wages, the Petitioner's absences were not of that type, and, therefore, are outside the scope of the Rule.

Although the CBD Prevention Program is not a workers' compensation program, the Petitioner has avenues of relief. In addition to state workers' compensation, two federal compensation programs provide for benefits for a DOE contractor employee with CBD - Subpart B and Subpart E of the EEOCIPA. See 42 U.S.C. §§ 7384, 7385; 20 C.F.R. Parts 1 and 30. We encourage the Petitioner to seek relief through those programs.

IT IS THEREFORE ORDERED THAT:

- (1) The Petition for Special Redress filed by XXXXXXXXXXXX, Case No. TEG-0001, be, and hereby is, denied.
- (2) This is a final agency decision of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: October 6, 2005